No. 91-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

vs.

RENE ALBERTO RODRIGUEZ, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF THE PETITIONER

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, CA 90067
(310) 284-2231

**Counsel of Record*

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") has requested the consent of the parties to file an *amicus curiae* brief in favor of the petitioner. As shown by the letter filed with the Clerk of this Court, the petitioner has consented; the respondents have declined to respond to our request.

Therefore, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States, the NAHB hereby moves this Court for leave to file the attached *amicus curiae* brief on behalf of the petitioner.

I.

THE NAHB'S INTEREST ARISES FROM THE CONCERNS OF ITS MEMBERS WITH THEIR ABILITY TO OBTAIN JUDICIAL REVIEW OF STATE ACTION WHICH DEPRIVES THEM OF THEIR RIGHT TO ENJOY PROPERTY CREATED BY STATE LAW

The NAHB represents over 153,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the ability of its members to exercise property rights created by state law.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1] It asks leave to file its *amicus curiae* brief in the present case in

[1] The Court's opinion cited the NAHB'S brief. 483 U.S. at 840.

order to assist this Court in determining whether local governmental action which arbitrarily and capriciously interferes with the enjoyment of a property right created by state law constitutes a violation of the substantive due process clause of the Fourteenth Amendment to the Constitution.

Dated: December 27, 1991

Respectfully submitted,

/s/KENNETH B. BLEY
KENNETH B. BLEY*
COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, CA 90067
(310) 284-2231

*Counsel of Record

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE ARGUMENT

The substantive due process clause of the Fourteenth Amendment protects state created property rights which, in the context of land use, means the right to obtain governmental approvals subject to reasonable regulation. It has been the rule, repeatedly stated by the Court, that arbitrary and unreasonable actions by local governmental entities violate a landowner's right to substantive due process. Every other

Circuit that has addressed the question has followed the Court's clear statement of the law and has held that a refusal to issue a land use approval to which a landowner is entitled under state law violates the landowner's right to substantive due process.

The First Circuit's fear that applying the protection of substantive due process to arbitrary and unreasonable land use decisions will convert federal courts into zoning boards of appeals overlooks 65 years of deference to local governmental entities' actions in the land use context which means, as a practical matter, that only the truly wrongful decisions are likely to be remedied.

ARGUMENT

I.

THE FIRST CIRCUIT HAS REFUSED TO RECOGNIZE THAT A LANDOWNER HAS A PROPERTY RIGHT IN THE USE OF ITS LAND

"The right of [a landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

The Court reemphasized the importance of that right almost 20 years ago.

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).[2]

The Court reaffirmed the constitutional protection afforded the right to use property only four years ago: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

Notwithstanding the Court's clear statements, the First Circuit has, for over a decade, held strongly to the view that the right of a landowner to use its land free of arbitrary and unreasonable governmental interference is not entitled to constitutional protection. Instead, as far as the First Circuit is concerned, disputes involving the right to use property should be resolved under state law in state courts. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982).[3]

It stated that view quite clearly in the case now before the Court, *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991): "This Court has re-

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[2] *Lynch* has been cited with approval as recently as this year. *Dennis v. Higgins*, - U.S. -, 111 S.Ct. 865, 870, 876 (1991).

[3] A landowner foolish enough to challenge an unfair land use decision by a local government in the First Circuit is likely to be held to have brought a frivolous action entitling the local government to attorneys' fees under 42 U.S.C. § 1988. *Carter v. Rollins Cablevision of Massachusetts, Inc.*, 634 F.Supp. 944 (D. Mass. 1986).

peatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process."

The Court of Appeals recognized that property interests are "defined by state law" and assumed that "PFZ had acquired a legitimate claim of entitlement to approval of the construction drawings and to issuance of a building permit." *Id.*, 928 F.2d at 30. Nevertheless, it held that the ARPE's refusal to comply with state law did not constitute a violation of PFZ's right to substantive due process.

> The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.' "

Id., 928 F.2d at 31-32.

The Court of Appeals concluded:

> Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacia Talega project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations to the federal constitution under a substantive due process label.

Id., 928 F.2d at 32.

If a court is unwilling to provide constitutional protection to state created property rights, what rights will it protect? The remainder of this brief will demonstrate that the First Circuit's position is wrong as a matter of both precedent and policy.

II.

ARBITRARY AND UNREASONABLE GOVERNMENTAL ACTION WHICH INTERFERES WITH THE USE OF LAND VIOLATES A LANDOWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

The Court has, for the last 65 years, reviewed land use decisions to determine if they violated the landowner's right to substantive due process. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the seminal land use case, involved an attack on zoning which was ". . . assailed on the grounds it is in derogation of section 1 of the Fourteenth Amendment of the federal Constitution in that it deprives appellee of liberty and property without due process of law . . . ." *Id.*, 272 U.S. at 384.

The Court then set forth the basis on which a determination could be made as to whether governmental action constituted a deprivation of property without due process of law: ". . . before the ordinance can be declared unconstitutional [it must be shown], that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.*, 272 U.S. at 395.

Village of Euclid and its statement as to the role of substantive due process in the land use context

are still good law. *United States v. Locke*, 471 U.S. 84, 104 (1985); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977); and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976).

The Court upheld zoning against a facial attack in *Village of Euclid*. Two years later, in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court held that the application of a zoning regulation to a particular piece of property was invalid. "The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.*, 277 U.S. at 185.

Nectow, like *Village of Euclid*, is still good law. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Finally, the Court still reviews governmental actions involving land use to see if the dictates of substantive due process have been complied with. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 197 (1985) (no violation of substantive due process in the denial of a subdivision map on the facts).

III.

WHILE THE FIRST CIRCUIT STANDS ALONE IN ITS REFUSAL TO RECOGNIZE THE POSSIBILITY OF A SUBSTANTIVE DUE PROCESS VIOLATION IN THE LAND USE CONTEXT, ITS POSITION IS BEGINNING TO INFLUENCE OTHER FEDERAL CIRCUITS

A. The First Circuit's Position Is Contrary To The Position Of Every Other Circuit Which Has Addressed The Question

The only question being reviewed by the Court is whether the "arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983." *See PFZ Properties, Inc. v. Rodriguez*, 112 S.Ct. 414 (1991) (No.91-122) (cert. granted limited to question two in the petition).

The First Circuit stands alone in its refusal to provide substantive due process protection to a state created property right. All of the other federal Circuits which have considered the question have held that a governmental entity which refuses to issue a land use approval to which a landowner is entitled under state law violates the landowner's right to substantive due process. *See, e.g., Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986) (certificate of occupancy); *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851, 868 (1988) (building permit); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (building permit); *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984) (use permit); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989) (certificate of occupancy); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir.

1986) (building permit)[4]; *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (building permit); and *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir.), *reh'g denied*, 703 F.2d 582 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983) (subdivision map).

B. The First Circuit's Position Has Begun To Influence The Way Some Other Circuits Are Reviewing Local Governments' Refusals To Issue State Mandated Land Use Approvals

None of the other Circuits have retreated from the position, set forth in the cases cited in Section III. A., *supra*, that the wrongful refusal of a local government to issue a state mandated land use approval constitutes a violation of a landowner's right to substantive due process. However, several Circuits and the district courts in those Circuits have begun, citing the First Circuit's position,particularly as set forth in *Creative Environments*, *supra*, to apply a standard of review which is tantamount to adopting the First Circuit's position because the result is, uniformly, to uphold the local government's action.

In *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988), the court stated: "No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Creative Environments* was cited with approval. *Coniston Corp.*, 844 F.2d at 467.

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[4] As noted in Section III. B., *infra*, the Sixth, Seventh, and Eighth Circuits, under the influence of the First, have begun to back track on their determinations that a refusal to issue a land use approval mandated by state law constitutes a violation of substantive due process.

The result is that the Seventh Circuit has gone far beyond the rule set down by the Court in *Village of Euclid* and now holds that a "zoning decision denies substantive due process only if it is invidious or irrational." *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir.), *cert. denied*, 493 U.S. 853 (1989).

A concurring opinion in *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987), stated that substantive due process claims in the land use context ". . . should, however, be limited to the truly irrational—for example, a zoning board's decision made by flipping a coin . . . ." The concurrence was based on agreement with the approach taken by the First Circuit. 846 F.2d at 472. See also *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990), which holds that a due process violation can exist in the land use approval context only if it is "egregious" or "irrational".

The Sixth Circuit has decided that substantive due process claims may only be maintained in those situations where "the alleged conduct shocks the conscience of the court." *G. M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 332 (6th Cir. 1990).

A district court in the Sixth Circuit, relying on the First Circuit's approach, has stated: "Plaintiff's allegations of bad faith, abuse of authority, and arbitrary and capricious conduct in local land use proceeding may state a claim under state law, but they fail to state a federal claim under the substantive due process clause of the United States Constitution."

Crooked Lake Development, Inc. v. Emmet County, 763 F.Supp. 1398, 1403 (W.D. Mich. 1991).[5]

Finally, the standards of review quoted above are also being used by the First Circuit. See *PFZ Properties*, 928 F.2d at 31-32, quoted in Section I, *supra*.

IV.

THERE IS MORE THAN ADEQUATE PROTECTION UNDER FEDERAL LAW TO ENSURE THAT FEDERAL COURTS DO NOT BECOME ZONING BOARDS OF APPEALS

The First Circuit indicated in *Creative Environments*, *supra*, that it did not want to have district courts act as zoning boards of appeals and therefore would not allow "run of the mill" disputes between a landowner and a local governmental entity "to rise to the level of a due process violation." 680 F.2d at 833. In doing so, the First Circuit neglected the procedural protections which have been erected over the years by the Court to ensure that decisions, otherwise proper, by local zoning authorities will not be overturned by a district court merely because it (or a landowner) disagrees with them.

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[5] The district court in *Crooked Lake Development*, 763 F.Supp. at 1404, went even further for it stated "that in local land use disputes the general substantive due process claim is superseded by the specific guarantees contained in the Fifth Amendment's taking clause." This is, of course, in complete disregard of the Court's analysis in *Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*, 473 U.S. at 186, where the Court first reviewed the landowner's claim under the Just Compensation Clause and then "under the due process theory that petitioners espouse." *Id.*, 473 U.S. at 197.

"If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid*, *supra*, 272 U.S. at 388. The "fairly debatable" rule means that the local governmental authority is not even required to show that its decision was correct by a preponderance of the evidence; it is enough that it merely adduce evidence to show that its decision was "fairly debatable."

> The parameters of the judicial review of legislative zoning decisions are well settled. The action of the local governing body in enacting or amending its zoning ordinance is presumed to be valid. Inherent in the presumption of legislative validity is the presumption that the classification that the ordinance contains, and the distinctions which it draws, are not arbitrary, are not capricious, but reasonable. Where such presumptive reasonableness is challenged by probative evidence of unreasonableness, the ordinance cannot be sustained unless the governing body meets the challenge with some evidence of reasonableness. But the governing body is not required to go forward with evidence sufficient to persuade the fact-finder of reasonableness by a preponderance of the evidence. The burden is less stringent. If evidence of reasonableness is sufficient to make the question 'fairly debatable,' the ordinance must be sustained.

Board of Supervisors v. Southland Corporation, 224 Va. 514, 522-523, 297 S.E.2d 718, 722 (1982). The *Southland* case is typical; see 1 Ziegler, *Rathkopf's*

The Law of Zoning and Planning, Shift in Burden of Proof, § 5.02[3] (1991).

Thus, allowing a landowner to seek judicial review in the federal courts under the substantive due process clause will not, as feared by the First Circuit, mean that every land use decision will immediately be at risk nor that the landowner's lawyer will immediately conclude that the landowner's chance of success is higher in federal court than in state court.

CONCLUSION

The position espoused by the First Circuit is contrary to long established law laid down by the Court. It is contrary to the law established in every other circuit which has considered the question. It establishes a policy which denies landowners their rights to protection which goes back to Magna Carta.

It should not be allowed to stand.

Dated: December 27, 1991

Respectfully submitted,

KENNETH B. BLEY*
COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, CA 90067
(310) 284-2231

**Counsel of Record*

WILLIAM H. ETHIER
NATIONAL HOUSING CENTER
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359